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No. 02-1315

IN THE SUPREME COURT OF THE UNITED STATES

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

The Washington Constitution provides that no public money shall be appropriated or applied to religious instruction. Following this constitutional command, Washington does not grant college scholarships to otherwise eligible students who are pursuing a degree in theology. Does the Free Exercise Clause of the First Amendment of the United States Constitution require the state to fund religious instruction, if it provides college scholarships for secular instruction?

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 299 F.3d 748. Pet. 1a-50a. The court's order denying the petition for rehearing and for rehearing en banc is unpublished. Pet. 86a-87a. The opinion of the United States District Court for the Western District of Washington is also unpublished. Pet. 51a.

JURISDICTION

The judgment of the Ninth Circuit was entered July 18, 2002. Pet. 1a. On November 26, 2002, the Court of Appeals issued an order denying a timely petition for rehearing and petition for rehearing en banc. Pet. 86a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Free Exercise Clause of the First Amendment to the United States Constitution provides: "Congress shall make no law . . . prohibiting the free exercise [of religion.]"

The Washington Constitution article I, § section 11 provides, in part:

> "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment[.]" Pet. 88a.

Wash. Rev. Code § 28B.10.814 provides: "No aid shall be awarded to any student who is pursuing a degree in theology." Pet. 92a.

Other relevant statutes and regulations include the legislative appropriation that began the Promise Scholarship program (Pet. 89a-91a), the statutes establishing the program on a continuing basis (Pet. 92a-96a), and the regulations adopted to implement the program (JA 178-87).

STATEMENT

This case concerns a challenge to the Washington Constitution and a state statute that prohibit using public funds to pay for religious instruction. The question is whether the Free Exercise Clause of the First Amendment of the United States Constitution requires the state to pay for religious instruction when it pays for secular instruction.

1. Religious Freedom Section Of The Washington Constitution

Adopted in 1889 as part of the original Washington Constitution, article I, section 11 guarantees religious freedom for Washington citizens.[1] Article I, section 11 begins by guaranteeing freedom of conscience in matters of religion and limiting government authority that impacts religious activities:

[1] The 1889 Washington Constitution also provided that: "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." Wash. Const. art IX, § 4 This provision applies only to primary and secondary schools and not to higher education institutions. *State ex rel. Gallwey v. Grimm*, 146 Wash. 2d 445, 464, 48 P.3d 274, 284 (2002).

> "Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion[.]" Wash. Const. art. I, § 11, Pet. 88a.

In tandem with this limit on government authority, article I, section 11 contains an explicit prohibition on government funding of religious activities:

> "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment[.]" Wash. Const. art. I, § 11, Pet. 88a.

This provision has long been interpreted as establishing a clear demarcation, broadly prohibiting both religious exercises or instruction in the public schools and the public funding of such activities. Two years after statehood, in 1891, the Washington Attorney General concluded that article I, section 11 prohibited teachers in the public schools from conducting devotional or religious exercises during the school day. 1 Op. Att'y Gen. 142 (1891). According to the Attorney General, the provisions of article I, section 11 were not "the work of the enemies, but of the friends of religion". 1 Op. Att'y Gen. at 145. The framers and the people "were unwilling that any avenue should be left open for the invasion of the right of absolute freedom of conscience in religious affairs". 1 Op. Att'y Gen. at 145. According to the Attorney General, the framers and the people

"were unwilling that any man should be required, directly or indirectly, to contribute toward the promulgation of any religious creed, doctrine or sentiment to which his conscience did not lend full assent". 1 Op. Att'y Gen. at 145.

In *State ex rel. Dearle v. Frazier*, 102 Wash. 369, 370, 173 P. 35 (1918), the Washington Supreme Court quoted this Attorney General Opinion with approval when it concluded that a proposal to include religious instruction in the curricula of public high schools violated article I, section 11.[2]

This provision of article I, section 11 provides for greater separation of church and state than the First Amendment. In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (*Witters* II), this Court ruled that a Washington financial aid program did not violate the Establishment Clause, even though the recipient was "studying the Bible, ethics, speech, and church administration in order to equip himself for a career as a pastor, missionary, or youth director". *Witters* II, 474 U.S. at 483. On remand, in *Witters v. Washington Commission for the Blind*, 112 Wash. 2d

[2] Justice Brennan noted the Washington Supreme Court's decision in *Dearle* when he found it "remarkable that the courts of a half dozen States found compulsory religious exercises in the public schools in violation of their respective state constitutions" in the late nineteenth century when the First Amendment had not yet been applied to the states and many state constitutional provisions were less rigorous than the Establishment Clause. *Sch. Dist. of Abbington Township v. Schempp*, 374 U.S. 203, 275 & n.51 (1963) (Brennan, J., concurring).

363, 771 P.2d 1119 (1989), *cert. denied sub nom. Witters v. Washington Department of Services for the Blind*, 493 U.S. 850 (1989) (*Witters* III), the Washington Supreme Court held that providing the funds would violate article I, section 11, which prohibits "the *application* of public funds to religious instruction". *Witters III*, 112 Wash. 2d at 370, 771 P.2d at 1122. The court also rejected Witters' Free Exercise claim. *Id.* at 372, 1123 ("[T]he Commission's only action was to refuse to pay for his theological education. The Commission's decision may make it financially difficult, or even impossible, for [an] applicant to become a minister, but this is beyond the scope of the free exercise clause. We hold that the Commission's refusal to provide financial assistance did not violate the free exercise clause of the federal constitution.").

2. The Washington Constitution Does Not Prohibit The Secular Study Of Comparative Religion

Although the Washington constitution forbids using public funds for religious instruction–that is, instruction that inculcates belief (or disbelief) in God–it does not prohibit the secular study of the topic of religion. In *Calvary Bible Presbyterian Church v. Board of Regents*, 72 Wash. 2d 912, 436 P.2d 189 (1967), *cert. denied*, 393 U.S. 960 (1968), the court ruled that teaching the Bible as literature did not violate article I, section 11. According to the court, the constitution's bar on religious instruction only forbids public funding of "that category of instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and

conduct". *Calvary Bible Presbyterian Church*, 72 Wash. 2d at 919, 436 P.2d at 193. Thus, public colleges and universities in Washington teach about religion, but do not provide instruction to inculcate belief or disbelief in the doctrine of a particular religion. For example, the University of Washington offers a number of courses in comparative religion. JA 66-74. But none of these courses are devotional in nature or designed to induce religious faith. Instead, religious ideas are studied as an aspect of the general intellectual and cultural history of societies and civilizations. JA 84, ¶ 3.

In addition to funding public colleges and universities, Washington provides financial assistance to individuals attending private institutions of higher education. The same constitutional line governs this scholarship aid as applies to the public colleges and universities supported by the state—the state will fund secular education, but not religious instruction. To this end, in 1969, the Washington Legislature adopted Wash. Rev. Code § 28B.10.814, which provides: "No aid shall be awarded to any student who is pursuing a degree in theology." Pet. 92a.

3. The Promise Scholarship Program

In 1999, the Washington Legislature created the Promise Scholarship program, to be administered by the Higher Education Coordinating Board (HEC Board). The scholarships are only available to students graduating from a public or private high school located in Washington. Wash. Admin. Code § 250-80-020(12)(a), JA 180. To receive the scholarship, a student must meet academic, income, and enrollment eligibility requirements. JA 180. First, the student must meet one of three academic

criteria—(1) graduate in the top fifteen percent of his or her graduating class, or (2) attain a cumulative score of 1200 or better on the Scholastic Assessment Test I, or (3) attain a score of 27 or better on the American College Test. Wash. Admin. Code § 250-80-020(12)(b)-(d), JA 180.

Second, under the income requirement, the student must have a family income less than 135% of the state's median. Wash. Admin. Code § 250-80-020(12)(e), JA 180.

Finally, there are three enrollment requirements. First, the student must enroll in an eligible post-secondary institution located in Washington. Wash. Admin. Code § 250-80-020(12)(f), JA 180. Eligible institutions include both public institutions authorized by the Washington Legislature and private institutions accredited by a nationally recognized accrediting body. Wash. Admin. Code §250-80-020(13), JA 180. Under the criteria, private religious institutions qualify if they are accredited. Second, the student is enrolled at least half time. Wash. Admin. Code § 250-80-020(12)(f), JA 180. Third, the student is not using the scholarship to pursue a theology degree. Wash. Admin. Code § 250-80-020(12)(g), JA 180.

The maximum amount of the scholarship is limited to the average annual tuition and fees for resident students attending the state's community and technical colleges, as determined by the HEC Board. Wash. Admin. Code § 250-80-050(1), JA 183-84. The program is funded through the state general fund, and there is no federal money involved. JA 134. The actual amount of the scholarship depends on the annual appropriation, which is

evenly prorated among the eligible students. Wash. Admin. Code § 250-80-050(2), JA 184. For example, in 1999 the maximum award was $1,584. JA 53. The actual award was $1,125. JA 57.

Students seeking a Promise Scholarship submit a completed application to the HEC Board. Wash. Admin. Code § 250-80-030(1), JA 182. The HEC Board notifies students who meet the academic and income requirements that they are eligible to receive the Promise Scholarship if they meet the enrollment requirements. JA 95.

When a student enrolls at an eligible institution, the school confirms the enrollment requirements. The institution must certify to the HEC Board (1) that the student has been matched and verified as eligible against the list of eligible students provided by the HEC Board; (2) that the student is enrolled at least half time; and (3) that the student is not pursuing a degree in theology. JA 59-60. It is up to the school the student is attending to determine, as the one with the best knowledge of its curriculum, whether the student is pursuing a degree in theology. JA 126, 131, 137. The HEC Board does not make this determination. JA 128-30.

If the student meets the enrollment requirements, the scholarship funds are sent to the institution for distribution to the student. Wash. Admin. Code § 250-80-060, JA 184-85. If a student enrolls in two schools during the same term, the scholarship may be used at only one of them. JA 58. Eligible students may renew their scholarship for a second year, subject to available funding. Wash. Admin. Code § 250-80-070, JA 185.

4. Joshua Davey's Application For The Promise Scholarship

When Joshua Davey was a senior in high school, he learned about the newly created Promise Scholarship program. Davey applied for the scholarship since he was graduating from a school located in Washington and met the academic and income requirements.[3] JA 41. In August 1999, Davey was notified by Marcus Gaspard, the Executive Director of the HEC Board, that he was eligible to receive the scholarship, subject to the enrollment requirements. JA 53-54. The amount of the scholarship was $1,125. JA 57. Davey also received a letter of congratulations on his eligibility from Washington Governor Gary Locke. JA 55-56.

Davey is a Christian committed to living out his faith in every aspect of his life. Because of his religious beliefs, he had planned for many years to attend a Bible college to prepare himself for a lifetime of ministry as a church pastor. JA 40. Davey chose to attend Northwest College. Northwest College is an eligible school located in Washington. JA 130.[4] Northwest has Departments

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[3] The Promise Scholarship began as a pilot program in the 1999 appropriations act. 1999 Wash. Laws ch. 309(6)(i), Pet. 89a. Subsequently, in March 2002, the Promise Scholarship was adopted as a continuing statutory program and the HEC Board adopted rules. *See* Wash. Rev. Code §§ 28B.119.010-.020, Pet. 92a-96a; Wash. Admin. Code §§ 250-80-101 to 250-80-100, JA 178-87. Since 1999, the relevant eligibility requirements to receive the scholarship have remained the same.

[4] During the 1999-2000 academic year, 15 students who attended Northwest College received Promise Scholarships. JA 145.

of Religious Studies, Education, Nursing, and Arts and Sciences. JA 147.

Northwest's concept of education is distinctly Christian in the evangelical sense. It recognizes the Bible as the divine communication of truth. JA 168. The purpose of the Department of Religious Studies is to prepare students for the ministry. JA 148. Davey chose Northwest College because he could train to be a minister at a reasonable cost. JA 41. He decided on a double major—Pastoral Ministries and Business Management and Administration. JA 43. The courses Davey would take in his Pastoral Studies major teach the Bible as truth, whereas a purely academic understanding would not necessarily subscribe to the Bible as ultimate truth. JA 110-11.

In October 1999, Davey met with Lana Walter, Director of Financial Aid at Northwest College. She verified that Davey was on the HEC Board list of students who met the academic and income requirements for the scholarship. However, she determined that Davey did not meet the enrollment requirements, because he was pursuing a degree in theology. At Northwest College, students in the Department of Religious Studies are majoring in theology. Thus, Northwest "determined which students on the list were majoring in our Religious Studies, and . . . did not request a warrant from the State". JA 147.[5] Davey does not dispute the fact

[5] Davey was under the impression that to receive the scholarship he had to sign a form stating that he was not pursuing a degree in theology. JA 46. Although he did not see the form, he refused to sign it. JA 46, 103. This appears to be a form developed by Northwest. According to Walter, for other state programs the students must sign a form and "we have added that to the Promise Scholarship recipients as well". JA 166. (The form, titled Washington Promise Scholarship Condition Of Award, is set out in the record at JA 92-93.) In fact, the HEC Board does not require students to sign a condition of award letter and did not create any form for Promise Scholarship recipients to sign. The only thing the HEC Board requires is certification by the institution itself regarding the eligibility of the student. JA 86, 89.

that his Pastoral Studies major constitutes pursuing a degree in theology. JA 104. And because he was pursuing a degree in theology, he did not receive the Promise Scholarship for the 1999-2000 academic year.

In August 2000, Davey was informed that he was eligible–subject to the enrollment requirements–to receive the Promise Scholarship for a second year, covering the 2000-2001 academic term. This time the scholarship was in the amount of $1,542. JA 95. In October 2000, Northwest College sent a letter informing him that "[i]t is our understanding from the Registrar's Office that you have declared a major in religious studies. Consequently, Northwest College is unable to request funds for the Washington State Promise Scholarship." JA 97.

The basis for denying Davey the scholarship is that he did not meet the enrollment requirements. Davey was not denied the scholarship because he identified himself as a Christian, and no one ever told him that the Promise Scholarship would require him to refrain from discussing his religious beliefs. JA 116-17. Davey was also never told that the Promise Scholarship would require him to stop associating with any particular individuals. JA 117.

5. Denial Of The Scholarship Did Not Prevent Davey From Pursuing A Degree In Theology

The lack of scholarship funds did not prevent Davey from pursuing his Pastoral Studies major at Northwest. JA 116. In addition, Davey could have received the Promise Scholarship and pursued both a business degree and a theology degree. If Davey had attended Northwest College half time and majored only in Business Management and Administration he would have met the enrollment requirements to receive the Promise Scholarship. Nothing would have prevented him from enrolling in another college to pursue his theology degree. If a student enrolls in two schools during the same term, the Promise Scholarship may be used at only one of them. JA 58. Thus, Davey would have to use his own funds to pay for his theology degree. Nothing in the Promise Scholarship program would have prevented him from doing so.

6. Proceedings Below

In January 2000, Davey brought suit in the United States District Court for the Western District of Washington against the Governor of Washington, Gary Locke, and officials of the HEC Board, in their official and individual capacities (collectively, the HEC Board). JA 4-23. Davey alleged violations of the First and Fourteenth Amendments of the United States Constitution, as well as provisions of the Washington Constitution. Davey sought a declaratory judgment that Washington's refusal to fund his degree in theology was unconstitutional. Davey also sought an injunction, damages, and attorneys

fees. In March 2000, the district court denied Davey's motion for a preliminary injunction. JA 75.

The parties filed cross motions for summary judgment, and in October 2000, the district court issued an order granting the HEC Board's motion for summary judgment and denying Davey's motion for summary judgment. Pet. 51a-85a.

The district court rejected Davey's challenge under the Free Exercise Clause of the First Amendment relying on *Lyng v. Northwest Indian Cemetery Protection Association*, 485 U.S. 439 (1988) (logging and road-building in forest on federal lands traditionally used by Native American tribes for religious rituals not subject to strict scrutiny), and *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right and, thus, is not subject to strict scrutiny). Pet. 67a. The court reasoned that while a citizen may not be unduly prohibited from practicing his religion, he may not demand that the government pay for his religious pursuits. Pet. 67a-68a. According to the court, "[t]here is no dispute that [the HEC Board] has not prohibited Davey from studying pastoral ministries." Pet. 68a. The court distinguished *Sherbert v. Verner*, 374 U.S. 398 (1963) (requiring a person to work on Saturday in violation of her religion to obtain unemployment compensation must be justified by a compelling state interest), based on *Employment Division, Department of Human Resources v. Smith*, 492 U.S. 872 (1990) (general law prohibiting use of peyote employed in religious ceremony is not subject to strict scrutiny). According to the district court, *Smith* noted the

limitations of *Sherbert* and recognized that the Court has consistently refused to apply the holding outside the unemployment compensation area. Pet 69a. The district court also distinguished *Sherbert* because, in *Smith*, the Court held that the compelling interest test of *Sherbert* would only be applied in *Sherbert's* limited factual context. Pet. 70a-71a. Finally, the district court distinguished *McDaniel v. Paty*, 435 U.S. 618 (1978) (law prohibited minister from exercising constitutional right to hold office). According to the district court, McDaniel had a constitutional right to seek office. But unlike McDaniel, Davey does not have a constitutional right to have Washington fund his religious instruction. Pet. 71a-72a.

The district court rejected Davey's claim that the HEC Board violated his rights under the Establishment Clause of the First Amendment. The court concluded that the Establishment Clause does not require the government to provide assistance to make the practice of religion easier. Pet. 72a-73a.

The district court also rejected Davey's claims that his First Amendment rights of speech and association were violated. With regard to the free speech claim, the district court held that Davey had not identified any restriction on his freedom to speak and that he had no basis for requiring the state to fund the exercise of his First Amendment rights. Pet. 73a-74a. The district court distinguished *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995) (limited public forum established by university for student speech could not exclude religious speech). The district court concluded that *Rosenberger* did not apply because the Promise Scholarship did not create

a public forum. The purpose of the program was not to subsidize student speech, but simply to pay for educational expenses. Pet. 75a-77a. The district court rejected Davey's freedom of association claim because the only evidence he presented was that he had to spend a few extra hours a week working instead of spending the time with his fellow students. The court concluded that this *de minimis* burden was wholly insufficient to make out a claim under the First Amendment. Pet. 78a-80a.

Finally, the district court rejected Davey's claim under the Due Process Clause of the Fourteenth Amendment. The court ruled that none of Davey's constitutional rights were abridged. That being so, there was a rational basis for the state's refusal to fund Davey's religious education. That basis was the state's interest in preventing violations of the state's constitutional establishment clause. Pet. 80a-82a.[6]

Davey filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit. At the same time, Davey moved the district court for a temporary injunction pending appeal. In this motion, Davey sought to require the HEC Board to put $1,542 in escrow pending the outcome of the appeal. This is the amount of the Promise Scholarship for the 2000-2001 academic year. In response, the HEC Board offered to set aside that amount in its operating budget, to be paid to Davey if his appeal was successful. Based on that offer, the

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[6] The district court also rejected Davey's claims that the HEC Board violated provisions of the Washington Constitution. Pet. 57a-66a.

district court denied Davey's motion. JA 171a-74a. The parties filed with the court their agreement for the escrow of the funds. JA 175-77.

On appeal, a divided panel of the Ninth Circuit reversed the district court and held that the HEC Board violated Davey's rights under the Free Exercise Clause of the First Amendment. Pet. 1a-50a. The majority did not address Davey's other constitutional claims.

The majority began its analysis by noting the competing lines of authority the parties relied on. Davey argued that he was singled out for unfavorable treatment in an otherwise neutral program on account of religion in violation of the free exercise rule of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (law prohibiting killing animals only when killing was part of religious ceremony discriminated against religion and was subject to strict scrutiny). Davey also argued that a state offering a benefit may not impose a disability on the basis of religious status, citing *McDaniel v. Paty*, 435 U.S. 618 (1978). Thus, the limit on the Promise Scholarship cannot stand unless it serves a compelling state interest. Pet. 11a. On the other hand, the HEC Board argued that declining to subsidize the exercise of a constitutional right is permissible and does not infringe that right based on *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Regan v. Taxation With Representation*, 461 U.S. 540 (1983). Pet. 12a.

The majority concluded that *Rust* and *Regan* did not apply for two reasons. First, according to the majority, the programs in *Rust* and *Regan* were set up for the government's own purpose as a

speaker. In contrast, the majority claimed that the purpose of the Promise Scholarship program was broad and must therefore be viewpoint neutral under *Rosenberger*. Pet. 12a. *Rosenberger* held that a limited public forum, established by the university to facilitate student speech, could not exclude religious speech. The majority expanded this concept and concluded that the government may limit the scope of a program it will fund, "but once it opens a neutral 'forum' (fiscal or physical), with secular criteria, the benefits may not be denied on account of religion". Pet. 21a.

Second, the majority distinguished *Rust* and *Regan* based on *McDaniel*. According to the majority, the state cannot offer a public benefit to all but exclude some on the basis of religion. In *McDaniel*, state law prohibited ministers from being delegates to the state constitutional convention. The majority found the situation here to be analogous in that a would-be minister could not receive a Promise Scholarship. Pet. 15a-16a.

The majority also concluded that Wash. Rev. Code § 28B.10.814, which provides that aid cannot be used to fund a degree in theology, is not neutral under *Lukumi*. The majority reached this conclusion even though it acknowledged that the statute "neither prohibits religious conduct nor does its application turn on a student's religious motivation". Pet. 14a. Nevertheless, the majority concluded that the statute was not neutral because the statute and implementing policy discriminate against religion by excluding only those students who declare a major in theology that is taught from a religious perspective. Pet. 14a-15a.

Having concluded that Wash. Rev. Code § 28B.10.814 was not neutral under *Lukumi*, the majority applied strict scrutiny. Pet. 25a. The majority went on to hold that the restriction on the Promise Scholarship was invalid because the state's interest in complying with the constitutional restriction in article I, section 11 was not compelling. Pet. 25a-30a.

The dissenting judge began by observing that "[t]his is a funding case, not a free exercise case or a free speech case." Pet. 33a. The dissent rejected the application of *Lukumi* and *McDaniel*, because those cases involved laws that burdened the exercise of constitutional rights. In the dissenting judge's view, the law at issue in *Lukumi* prohibited "the ritualistic slaughter of animals—that constitute a central practice of the Santeria religion". Pet. 34a. Thus, for church members, "[t]heir choice was to practice their religion upon threat of prosecution." Pet. 34a. Similarly, *McDaniel* pitted a minister's constitutional right to seek and hold office as a state citizen against a constitutional right to be a minister. Pet. 36a. In contrast to fundamental rights at issue in *Lukumi* and *McDaniel*, the dissent found that Davey's claim did not involve a "constitutional right to educational funding". Pet. 37a. According to the dissent, "Washington has neither prohibited nor impaired Davey's free exercise of his religion. He is free to believe and practice his religion without restriction." Pet. 32a. The only state action was "a decision consonant with the state constitution, not funding 'religious . . . instruction'". Pet. 32a.

The dissent also concluded that the state's long-standing policy, of preventing state interference

with religious practice by strictly limiting state involvement in religious instruction, could not support the majority's conclusion that the state was aiming to suppress disfavored religious ideas. Pet. 20a. Finally, the dissent rejected applying *Rosenberger*. In the dissent's view, this is not a free speech case and "the decision not to fund Davey's pursuit of a pastoral ministry degree does not implicate the free speech viewpoint concerns that drove the Court's decision in *Rosenberger*". Pet. 45a. The dissent pointed out that Northwest College is an eligible institution, even though it is a religious college, and concluded that there was no concern that Washington "has precluded, will preclude, or is even likely to preclude Davey from being exposed to the pervasively Christian perspective that permeates every aspect of his educational experience at Northwest College". Pet. 46a. Thus, choosing not to fund his theology degree would not limit Davey's exposure to a Christian viewpoint.

In the dissent's view, the controlling legal precedents were *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), which stand for the proposition that government decisions not to underwrite fundamental rights do not abridge those rights. Pet. 44a. Applying this principle, the dissent concluded that Washington had no obligation to fund Davey's theology degree.

After the Ninth Circuit's decision, the HEC Board filed a timely petition for rehearing and petition for rehearing en banc, which was denied. Pet. 86a-87a. The HEC Board filed a petition for a writ of certiorari, which was granted May 19, 2003.

SUMMARY OF ARGUMENT

The exclusion of a theology degree from the scope of Washington's Promise Scholarship program does not violate the Free Exercise Clause of the First Amendment.

1. This Court has held the government's decision not to fund the exercise of a fundamental right does not infringe that right. *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Nat'l Endowment For The Arts v. Finley*, 524 U.S. 569 (1998). This case falls squarely within this principle. Washington's decision not to subsidize religious instruction to implement its state constitutional policy of separation of church and state does not infringe Davey's right to seek a theology degree. The scholarship program leaves Davey in the same position he would occupy in the absence of a state funding program—able to obtain a theology degree using other funds available to him.

This is not a case where the state has conditioned the receipt of a benefit on the relinquishment of the right to engage in constitutionally protected religious activities. The Promise Scholarship does not impose "unconstitutional conditions" on the recipient of the funding. *See Speiser v. Randall*, 357 U.S. 513 (1958). Rather, it limits only the uses to which the program's funds may be applied. Students pursuing a theology degree at one institution may still use the scholarship to pursue a separate–secular–degree at a second school. Thus, there is no requirement for a relinquishment of rights that prohibits the recipient

from engaging in protected conduct. There is only a limit on the scope of the funding program.

Nor do the funding restrictions that apply to the Promise Scholarship aim at the suppression of views because they are considered "dangerous" or "disfavored" like the views involved in *Speiser* and *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). Rather, like the funding restrictions at issue in *Rust*, the enrollment requirement applies only to the scholarship program and is only for the purpose of furthering the state policy (here, avoiding government funding of religious instruction). The program does not suppress views that would otherwise be expressed or eliminate other channels of communication.

2. The enrollment requirements of the Promise Scholarship program do not prohibit or burden Davey's religious beliefs or practices in violation of the Free Exercise Clause. The state does not impose regulatory requirements or impact Davey's practice of religion beyond the choice not to fund his degree in theology. Nevertheless, the Ninth Circuit majority held that Washington's Promise Scholarship law is not neutral and is subject to strict scrutiny under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). It concluded that the Promise Scholarship program is discriminatory because it funds the secular study of religion and excludes only theology "taught from a religious perspective". Pet. 15a. The Ninth Circuit majority mistook the neutral distinction between secular and religious instruction for discrimination and a lack of neutrality that suppresses

religion. This approach ignores the distinction between secular and religious instruction that has been made under both the federal and state constitutions, and for similar non-discriminatory objectives: to avoid official support through the levy of taxes for religious activities.

3. Additionally, the Ninth Circuit majority concluded that the Promise Scholarship program constituted a limited fiscal forum that must be administered on a viewpoint neutral basis under *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995). But the purpose of the Promise Scholarship is not to create a forum for the exchange of a diversity of views, but to facilitate the education of low and middle income students. *Rosenberger* does not apply, just as it did not apply to a library's acquisition of Internet terminals and books to facilitate research and learning in *United States v. American Library Association*, 123 S. Ct. 2297 (2003).

The judgment of the Ninth Circuit should be reversed

ARGUMENT

1. Washington Is Not Required To Subsidize Davey's Constitutional Right To Pursue A Degree In Theology

The State of Washington funds a system of public universities and colleges. They teach numerous subjects—including comparative religion. But they cannot provide religious instruction, that is, instruction "that resembles worship and manifests a devotion to religion and religious principles in

thought, feeling, belief, and conduct". *Calvary Bible Presbyterian Church v. Board of Regents*, 72 Wash. 2d 912, 919, 436 P.2d 189, 193 (1967), *cert. denied*, 393 U.S. 960 (1968). This is forbidden by article I, section 11 of the Washington Constitution. Assistance to students seeking a college education at private schools through the Promise Scholarship is governed by the same constitutional distinction. The state provides financial assistance for all manner of secular instruction, but Wash. Rev. Code § 28B.10.814 prohibits granting aid to any student who is pursuing a degree in theology. Pet. 92a. There is no question that Davey has a constitutional right to practice his religion, including pursuing a degree in theology. However, he does not have a constitutional right to have the State of Washington pay for it.

This case turns on the application of two constitutional principles. First, a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right". *Rust*, 500 U.S. at 193. Second, the government may not condition the receipt of a benefit on the relinquishment of a constitutional right. *Speiser*. In this case, the first principle controls because the state does not require Davey to relinquish a constitutional right in order to receive a Promise Scholarship.

A. The State's Decision Not To Fund Davey's Theology Degree Does Not Infringe His Right To Seek The Degree

This Court has consistently held that the legislature's decision not to fund the exercise of a constitutional right does not infringe that right. The

Court has applied this principle to a number of different government funding programs. *Maher* (no right to Medicaid funding for medical services incident to constitutionally protected right to nontherapeutic abortions); *Harris* (no right to Medicaid funding for medical services incident to constitutionally protected right to medically necessary abortions); *Regan* (no right to tax exempt status for nonprofit organizations engaged in constitutionally protected lobbying activities); *Rust* (no right to federal funds to engage in constitutionally protected family planning service related to abortion); *Finley* (no right to federal funds for artists whose works do not meet general standards of decency); *American Library Ass'n*, 123 S. Ct. at 2308 (plurality) (no right to federal funds to pay for unfiltered access to the internet).

Like the constitutionally protected rights of free speech and reproductive choice, there is no question that Davey has the right to practice his religion—including pursuing a degree in theology. But under this Court's precedent, Davey does not have the right to have the State of Washington subsidize his exercise of that constitutional right. Moreover, the fact that Washington will not subsidize Davey's right to pursue a theology degree does not prevent him from seeking that degree. The Promise Scholarship enrollment requirements apply only to the institution where the scholarship will be used. If Davey had met the enrollment requirements at Northwest College, he

would have received the scholarship, and he still could have pursued his theology degree at another school—using his own funds.

The Ninth Circuit majority was under the impression that, if Davey accepted the scholarship, he could not pursue a degree in theology—even if he used non-government funds to do so. Pet. 24a. The majority was in error. The enrollment requirements are directed at the school where the scholarship is used. Thus, the HEC Board required Northwest to be an accredited institution located in Washington, to verify that Davey was the same individual who met the academic and income eligibility requirements, and to certify that Davey was enrolled at least half time and was not pursuing a degree in theology. Northwest makes the decision about whether a student is pursuing a theology degree based on its own superior knowledge of its curriculum. JA 126, 131, 137.

If Davey had met the enrollment requirements at Northwest by taking a degree in Business Management and Administration, he would have received the Promise Scholarship. But none of those enrollment requirements–once satisfied at Northwest–would have prevented Davey from simultaneously using his own money to pursue a theology degree in a separate program at a second school.

In fact, Washington has no interest in preventing Davey from using his own funds to obtain a theology degree. Article I, section 11 provides: "No *public money or property* shall be appropriated for or

applied to any religious worship, exercise or instruction, or the support of any religious establishment[.]" (Emphasis added.) There is no constitutional restriction on individuals using their own money to exercise their religious rights.

B. Washington Does Not Condition Receipt Of The Promise Scholarship On The Relinquishment Of A Constitutional Right

The Promise Scholarship does not implicate the second legal principle relevant to this case—that the government may not condition the receipt of a benefit on the relinquishment of a constitutional right. The Court's "'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program". *Rust*, 500 U.S. at 197. For example, in *Speiser*, California had a veteran's property tax exemption. To qualify, a veteran had to sign an oath that he or she did not advocate the overthrow of the government of the United States or California by force of violence or other unlawful means. *Speiser*, 357 U.S. at 515. The Court struck down this requirement because "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech". *Id.* at 519. In *Speiser*, the veteran had to sign the oath or lose the tax exemption. The condition broadly prohibited the veteran from engaging in protected conduct.

In contrast to *Speiser*, Davey need not forfeit his right to pursue a theology degree as a condition of receiving the Promise Scholarship. Nothing prohibits Davey from pursuing a theology degree outside of the Promise Scholarship program.[7] In situations where the only condition is limiting the use of public funds for the specific activity at issue, the Court has not found unconstitutional conditions and has applied the first principle that the government's decision not to subsidize the exercise of a fundamental right does not infringe that right.

Thus, in *Maher* and *Harris*, the government did not fund abortions, but this did not interfere with a woman's constitutional rights because she could still obtain an abortion using her own funds. There was no condition on the recipient. *Maher*, 432 U.S. at 474 ("An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires."); *Harris*, 448 U.S. at 317 ("the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all").

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[7] Further, Wash. Rev. Code § 28B.10.814 on its face belies any "unconstitutional condition". Davey's case would be a different one, and the one the Ninth Circuit found, if the statute stated: "No aid shall be awarded to any person who ever plans to become a minister." The statute, however, places no such condition on the recipient; it restricts only the type of instruction that the state financial aid programs will underwrite.

Similarly, in *Regan*, the Court upheld the federal law that denied tax exempt status to nonprofit corporations that engaged in lobbying activities. The Court found that the plaintiff in that case could receive tax exempt status and lobby if it set up an affiliate organization to ensure that none of the tax exempt contributions were used for lobbying. *Regan*, 461 U.S. 544 ("TWR can obtain tax deductible contributions for its non-lobbying activity by returning to the dual structure it used in the past, with a § 501(c)(3) organization for non-lobbying activities and a § 501(c)(4) organization for lobbying."). In *Rust*, the Court upheld a requirement that prohibited recipients of grants for family planning services from using grant money to provide information about abortion. But this restriction did prohibit a recipient from providing abortion services using other funds. *Rust*, 500 U.S. at 196 ("The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities.").[8]

On the other hand, the Court has struck down conditions that required a recipient to relinquish a constitutional right. In *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Court struck down a

[8] Although the Court did not discuss this point, *Finley* and *American Library Association* both are consistent with this principle. In *Finley*, the requirement that projects meet general standards of decency applied only to grant funds, so that the artist was free to create any kind of art using other funds. In *American Library Association*, there was nothing to prevent a library receiving federal funds from establishing an affiliate library, like the affiliate organization in *Regan*, to offer unfiltered internet access.

requirement that prohibited noncommercial radio and television stations that received federal funds from engaging in editorializing. Even though a station received only 1% of its income from the federal government, the station was "barred absolutely from all editorializing". *FCC*, 468 U.S. at 400. The Court noted that it would be different if the law "permitted noncommercial educational broadcasting stations to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds". *Id.* *Rust* distinguished *FCC* on this basis. *Rust*, 500 U.S. at 197 ("Under that law, a recipient of federal funds was 'barred absolutely from all editorializing' because it 'is not able to segregate its activities according to the source of its funding' and thus 'has no way of limiting the use of its federal funds to all noneditorializing activities.'").

Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001), also follows this pattern. *Velazquez* concerned federal grants to organizations that provided legal services to indigent clients. Organizations accepting the funds were prohibited from "litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system". *Velazquez*, 531 U.S. at 538. The Court struck this requirement down in part because indigent clients were forced to forfeit entirely government-funded legal services. The Court distinguished *Rust* because, in that case, the recipient of federal funds could use other funds to provide abortion related services. In the words of the Court, "[in *Rust*], a patient could receive the approved Title X family planning counseling funded by the Government and later could consult an affiliate or independent

organization to receive abortion counseling." *Velazquez*, 531 U.S. at 547. But the indigent client in *Velazquez* was required to forfeit all LSC assistance. According to the Court, "[u]nlike indigent clients who seek LSC representation, the patient in *Rust* was not required to forfeit the Government-funded advice when she also received abortion counseling through alternative channels. Because LSC attorneys must withdraw whenever a question of a welfare statute's validity arises, an individual could not obtain joint representation so that the constitutional challenge would be presented by a non-LSC attorney, and other, permitted, arguments advanced by LSC counsel." *Id.*

Of course, the government cannot "discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas". *Regan*, 461 U.S. at 548 (internal punctuation omitted). Restrictions that are designed to "single out a particular idea for suppression because it [is] dangerous or disfavored" are improper. *Velazquez*, 531 U.S. at 541. But this principle is consistent with the previously discussed broader principle that the government may not condition the receipt of a benefit on the relinquishment of a constitutional right. Programs that require such a relinquishment have been viewed by the Court as suppressing dangerous or disfavored ideas. *See Speiser v. Randall*, 357 U.S. 513, 519 (1958) (the denial of a tax exemption for engaging in certain speech is "frankly aimed at the suppression of dangerous ideas"); *Velazquez*, 531 U.S. at 548-49 (effect of funding restriction is to limit expression of legal theory in judicial system where unrestricted speech is necessary to its proper functioning). On the other

hand, when a program restricts only the use of the government funds provided and other channels of expression are not affected, the funding program is unlikely to involve an attempt to suppress views that are otherwise available. *See Rust*, 500 U.S. at 194-95 (statute authorizing grants for family planning services that could not be used in programs where abortion is a method of family planning was not such impermissible exclusion of a viewpoint).

The funding restrictions that apply to the Promise Scholarship do not seek to suppress a particular point of view. Rather, the restrictions further the policy reflected in the Washington Constitution of separating church and state to further religious freedom for all. There is no broader relinquishment of the right to exercise one's religion. Indeed, the guarantee of "[a]bsolute freedom of conscience in all matters of religious sentiment" in article I, section 11 removes barriers that might otherwise exist to expressing religious views. This guarantee of religious freedom "extends broader protection than the first amendment of the federal constitution". *First Covenant Church v. City of Seattle*, 120 Wash. 2d 203, 229-30, 840 P.2d 174 (1992); *Munns v. Martin*, 131 Wash. 2d 192, 930 P.2d 318 (1997) (government regulations may not be applied to facilities intimately associated with a church's religious mission, unless the government's interest is compelling; therefore a city's ordinance that imposed controls on demolition of historic structures could not interfere with the Catholic church's plan to demolish an old school building and construct a new pastoral center); *Washington v. Balzer*, 91 Wash. App. 44, 53 n.3, 954 P.2d 931 (1998) ("Protection for religious free exercise under the

Washington Constitution is greater than federal constitutional protection particularly in light of the U.S. Supreme Court's recent invalidation of the Religious Freedom Restoration Act in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).”). Moreover, the distinction between providing secular and religious education is one endorsed by this Court. *See infra* p. 39. The distinction is not aimed at the suppression of dangerous ideas.

In sum, Davey has a constitutional right to pursue a degree in theology, but the state has no obligation to fund Davey's exercise of this right. The limits on the Promise Scholarship program do not place restrictions on Davey's ability to use his own funds to pursue his theology degree or on his ability to be or become a minister. Rather, the conditions place limitations only on the use of program funds. These conditions were not intended to and do not operate to suppress a disfavored view.

2. Washington's Decision Not To Fund Davey's Degree In Theology Does Not Violate The Free Exercise Clause

The Court's decisions applying the Free Exercise Clause are consistent with the principle that the government's decision not to subsidize the exercise of a fundamental right does not infringe that right. A government subsidy that does not require the recipient to violate his or her religious convictions as a condition of receiving the benefit does not violate the Free Exercise Clause. Because Davey can receive the Promise Scholarship and still pursue his degree in theology using private funds, he is not required to violate his religious convictions.

A. Neutral Laws Of General Applicability That Impact Religion Are Not Subject To Strict Scrutiny

“The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.” *Empl. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990). Washington's decision not to apply public funds to pay for Davey's theology degree does not infringe Davy's right to believe and profess his beliefs. Even the Ninth Circuit majority agreed that “Wash. Rev. Code § 28B.10.814 neither prohibits religious conduct nor does its application turn on the student's religious motivation”. Pet. 14a.

The “‘exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation”. *Smith*, 494 U.S. at 877. In judging laws that impact religion under the Free Exercise Clause, this Court's decisions establish “the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice”. *Lukumi*, 508 U.S. at 531.

The “crucial word in the constitutional text is ‘prohibit'”. *Lyng*, 485 U.S. at 451. “For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.” *Id.* Decisions such as *Sherbert v.*

Verner, 374 U.S. 398 (1963), "cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions". *Lyng*, 485 U.S. at 450-51.

In particular, the Court has recognized the difference between "government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs [and] governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons". *Bowen v. Roy*, 476 U.S. 693, 706 (1986) (plurality opinion). Thus, in cases involving government benefits, the government "meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest". *Id.* at 708.

This standard applies unless there is "proof of an intent to discriminate against particular religious beliefs or against religion in general". *Id.* at 707. "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest". *Lukumi*, 508 U.S. at 533 (citation omitted).

The Promise Scholarship does not violate the Free Exercise Clause. Wash. Rev. Code § 28B.10.814 and article I, section 11 are neutral laws of general applicability that need not be justified by a compelling state interest. These laws do not prohibit religious conduct or turn on a student's motivation. They also serve a legitimate public interest. The "religious freedom" section of Washington's Constitution, although different in emphasis and application from the Establishment Clause, reflects the same policies. It seeks to avoid compelling support for the advancement of religious doctrines, the establishment of an official religion, and entanglement that accompanies the flow of public funds. A state constitution that is more specific about how these policies are effected and avoids the need for close judgments by adopting a clear demarcation on funding of religious activities is one reasonable approach to addressing these policy concerns. As the Court observed in *Norwood v. Harrison*, 413 U.S. 455 (1973):

> "a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance". *Id.* at 462.

The Ninth Circuit majority ruled that Wash. Rev. Code § 28B.10.814 and article I, section 11 are subject to strict scrutiny. This conclusion is wrong for two reasons. First, the enrollment conditions do not regulate Davey's religious conduct or burden his exercise of religion. Washington only chooses not to fund Davey's degree in theology and any impact on Davey's practice of religion is only

incidental. Second, contrary to the holding of the majority in the court below, the Promise Scholarship does not discriminate against religion when it draws the distinction between secular and religious instruction.

B. Declining To Pay For Davey's Theology Degree Does Not Burden Davey's Free Exercise Of Religion

There is a common thread running through the Court's Free Exercise decisions. They deal with laws that burden the actual practice of religion. Sometimes the Court has struck down these laws and sometimes it has sustained them. But the laws themselves burden the practice of religion. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1878) (lawprohibiting the practice of polygamy); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (law requiring a business license to distribute religious literature); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (law requiring compulsory school attendance, which was contrary to the Amish religion); *United States v. Lee*, 455 U.S. 252 (1982) (law requiring payment of social security tax, which was contrary to the Amish religion); *Lyng v. NW Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (logging and road-building in forest used for religious purposes); *Empl. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990) (law prohibiting use of peyote employed in religious ceremony); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (law prohibiting killing animals only when killing as part of religious ceremony).

In some cases, the laws burdening religion have done so by conditioning the receipt of a benefit

on surrender of a religious right and, in these cases, the Court has found a free exercise violation. *Sherbert v. Verner*, 374 U.S. 398 (1963) (law requiring Saturday work in violation of religion to obtain unemployment compensation); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (same); *Thomas v. Review Bd. of the Indiana Empl. Sec. Div.*, 450 U.S. 707 (1981) (law requiring weapons-related work in violation of religion to obtain unemployment compensation). These decisions are consistent with the Court's decisions that the government may not condition the receipt of a benefit on the relinquishment of a constitutional right. Indeed, *Sherbert* relied on *Speiser v. Randall*, 357 U.S. 513 (1958). *Sherbert*, 374 U.S. at 405. There is a violation if the government has placed a condition on the recipient's practice of religion. Thus, in *Sherbert*, the government required Sherbert to work on Saturday–in violation of her religious beliefs–in order to receive unemployment compensation. [9]

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[9] There is disagreement on the Court about the continuing vitality of *Sherbert*. *Smith*, 494 U.S. at 484 ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."); *id.* at 898 (O'Connor, J., concurring in the judgment) ("we have never distinguished between cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct. The *Sherbert* compelling interest test applies in both kinds of cases."). This case does not turn on the *Sherbert* test because, unlike requiring a person to work on Saturday, the denial of the Promise Scholarship is not based on requiring Davey to violate his religious beliefs.

The Ninth Circuit's reliance on *McDaniel v. Paty*, 435 U.S. 618 (1978), is misplaced. *McDaniel* concerned a state law that barred "[m]inisters of the Gospel, or priests of any denomination whatever from serving as delegates to the State's limited constitutional convention". *McDaniel*, 435 U.S. at 620 (internal punctuation omitted). The Court ruled that this law burdened McDaniel's free exercise rights because "McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other". *Id.* at 626. According to the Ninth Circuit majority: "Washington's restriction disables students majoring in theology from the benefit of receiving the Scholarship just as Tennessee's classification disabled ministers from the benefit of being a delegate." Pet. 16a. Thus, the majority concluded that:

> "A minister could not be *both* a minister *and* a delegate in Tennessee any more than Davey can be both a student pursuing a degree in theology and a Promise Scholar in Washington." Pet. 16a.

Unlike the laws in these cases, Washington's refusal to apply public funds to Davey's theology degree does not burden his practice of religion. Nor, as we have already explained (*supra* p. 26), does it impose an unconstitutional condition on Davey's receipt of the scholarship. Thus, the problem with the majority's analysis of *McDaniel* is that it is not factually accurate. Davy can be both a student pursuing a degree in theology and a Promise Scholar. He is only prohibited from using his

Promise Scholarship to fund his theology degree. As we have explained (*supra* p. 25), he is free to pursue his theology degree at another school using his own funds.

C. The Promise Scholarship Is A Neutral Law That Does Not Discriminate Against Religion

Under *Lukumi*, Wash. Rev. Code § 28B.10.814 and article I, section 11 do not require a compelling state interest, because they apply both neutrally and generally to all students eligible for Promise Scholarships. Neither the religion of the student, nor the student's motivation in seeking religious instruction, play any part in applicability of the statute.

The Ninth Circuit majority held that Wash. Rev. Code § 28B.10.814 is not neutral—even though it agreed that "Wash. Rev. Code § 28B.10.814 neither prohibits religious conduct nor does its application turn on the student's religious motivation". Pet. 14a. Despite this fact, the majority reasoned that the law lacked neutrality because the policy "excludes only those students who declare a major in theology that is taught from a religious perspective". Pet. 15a. In other words, students at a public or private university can receive a scholarship to study the secular subject of comparative religion, but Davey is disqualified from receiving a scholarship to pay for religious instruction in pursuing a theology degree.

The majority's analysis is flawed. What the majority dubs as a lack of neutrality is instead the perfectly permissible distinction between secular and

religious instruction. The Court has consistently relied on this distinction in addressing the "internal tension in the First Amendment between the Establishment Clause and Free Exercise Clause". *Norwood v. Harrison*, 413 U.S. 455, 469 (1973). Thus, in *Norwood*, the Court explained that this tension does not mean "a State is constitutionally obligated to provide even 'neutral' services to sectarian schools". *Norwood*, 413 U.S. at 469. On the other hand, while not required, a state can provide secular assistance to religious schools because

> "the transcendent value of free religious exercise in our constitutional scheme leaves room for 'play in the joints' *to the extent of cautiously delineated secular governmental assistance to religious schools,* despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools and their sponsors". *Id.* at 469 (emphasis added).

Distinguishing between secular and religious instruction serves the purpose of avoiding the official advancement of religion, not the impermissible object of suppression of religion. For example, decisions forbidding religious instruction in public schools have distinguished between secular use and religious use. In *McCollum v. Board of Education*, 333 U.S. 203 (1948), the Court struck down a plan to provide religious instruction during school hours, but recognized the importance of teaching the secular

subject of religion. *McCollum*, 333 U.S. at 236 (Jackson, J., concurring) ("The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity–both Catholic and Protestant–and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared."). In *School District of Abbington Township v. Schempp*, 374 U.S. 203 (1963), the Court refused to permit schools to begin each day with a reading from the Bible. However, the Court went on to explain: "Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a *secular program of education*, may not be effected consistently with the First Amendment." *Id.* at 225 (emphasis added). In *Stone v. Graham*, 449 U.S. 39 (1980), the Court prohibited posting the Ten Commandments on the wall of each classroom. The Court observed that this "is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like". *Id.* at 42. Washington's approach to this divide is completely consistent. *See Calvary Bible Presbyterian Church v. Bd. of Regents*, 72 Wash. 2d 912, 436 P.2d 189 (1967), *cert. denied*, 393 U.S. 960 (1968).

The Court's decisions regarding public assistance to religious schools have also followed the distinction between secular and religious assistance. In *Board of Education v. Allen*, 392 U.S. 236 (1968), the Court approved lending textbooks to students of religious schools. The Court recognized that the assistance was limited to secular assistance. *Id.* at 244-45 ("each book loaned must be approved by the public school authorities; only secular books may receive approval"). In *Agostini v. Felton*, 521 U.S. 203 (1977), the Court approved using public school teachers in religious schools to provide remedial education. The Court emphasized the secular nature of the assistance. Under the rules, the teachers "could not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools". *Id.* at 211. Most recently, in *Mitchell v. Helms*, 530 U.S. 793 (2000), the Court upheld a program to distribute federal funds to state agencies which, in turn, lend educational materials and equipment to public and private schools, including religious schools. The Court emphasized the secular nature of the assistance. *Id.* at 802 (plurality opinion) ("Most significantly, the 'services, materials, and equipment' provided to private schools must be 'secular, neutral, and nonideological.'").[10]

[10] In a different context, the Court approved the inclusion of a crèche in a holiday display because of the secular purpose. *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring) ("The evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.").

Washington provides all manner of instruction in its public universities and colleges—including the secular subject of comparative religion. But the Washington Constitution forbids using public funds for religious instruction that inculcates religious belief (or disbelief). The state's aid to students attending private colleges and universities also makes this distinction. The distinction drawn by Washington is the same distinction that this Court has drawn between secular and religious instruction. Of course, in *Witters* II, this Court held that aid to a student to study theology did not violate the Establishment Clause because the aid "is paid directly to the student, who transmits it to the educational institution of his or her choice". *Witters* II, 474 U.S. at 488. As a result, any aid "that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients". *Id.* The fact that the Washington Supreme Court drew a different line in *Witters* III, 112 Wash. 2d 363, 771 P.2d 1119, does not invalidate the validity of the distinction between secular and religious instruction. For both federal and state constitutional purposes, the objective is the same (and is not discriminatory): to avoid providing official support through the levy of taxes to religious activities.

In sum, Washington's decision not to fund Davey's theology degree does not violate the

Free Exercise Clause. It does not burden Davey's right of free exercise of religion. Moreover, the prohibition does not discriminate against religion, because it follows the neutral line between secular and religious instruction.

3. The Promise Scholarship Does Not Establish A Public Forum

This case is controlled by the principle that the government's decision not to subsidize the exercise of a fundamental right does not infringe that right. The Ninth Circuit majority refused to apply this principle, in part, because it concluded that the Promise Scholarship program was a limited public forum that must be administered on a viewpoint neutral basis under *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995). The majority concluded that it was not viewpoint neutral because it excludes only those who pursue the study of theology from a religious perspective. Pet. 12a.

The majority's analysis is mistaken. *Rosenberger* does not apply, because the Promise Scholarship program does not constitute a public forum. It is certainly true that some government subsidies create public forums. The university's payment of the cost of printing the publications of student groups in *Rosenberger* constituted a limited forum. But not every government subsidy creates a public forum. For example, in *Finley*, the Court refused to apply *Rosenberger* because grants to artists by the National Endowment For The Arts did not constitute a public forum. *Nat'l*

Endowment For The Arts v. Finley, 524 U.S. 569, 586 (1998) (*Rosenberger* does not apply because in "arts funding, in contrast to many other subsidies, the Government does not indiscriminately 'encourage a diversity of views from private speakers'"); *id.* at 599 (Scalia, J., joined by Thomas, J., concurring in the judgment) ("*Rosenberger* . . . found the viewpoint discrimination unconstitutional . . . because the government had established a limited public forum—to which the NEA's granting of highly selective (if not highly discriminating) awards bears no resemblance.").

Thus, when the government provides a subsidy, at "the outset . . . it is instructive to ask whether public forum principles apply to the case at all". *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672 (1998). A limited or designated public forum like the one in *Rosenberger* "may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects". *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). The key is that the purpose of the forum is for speech. So, in *Rosenberger*, the university "expend[ed] funds to encourage a diversity of views from private speakers". *Rosenberger*, 515 U.S. at 834.

Unlike *Rosenberger*, the purpose of the Promise Scholarship program is not to encourage a diversity of views from private speakers. The purpose, according to the Washington Legislature,

was "to strengthen the link between post-secondary education and K-12 education", finding that "increasingly, an individual's economic viability is contingent on postsecondary educational opportunities". Wash. Rev. Code § 28B.119.005, Pet. 92a. The Washington Legislature sought to make such economic benefits available to low and middle income students who work hard and successfully complete high school with high grades. Wash. Rev. Code § 28B.119.005, Pet. 92a.

The Ninth Circuit majority undertook no close inspection of the Promise Scholarship when analogizing this case to *Rosenberger*. Instead, the majority held that "funding students' *education* . . . is not much different" from the extracurricular *speech* program at issue in *Rosenberger*. Pet. 20a. *United States v. American Library Association*, 123 S. Ct. 2297 (2003), rejected a similar argument. In *American Library Association*, the federal government provided grants to libraries to facilitate their access to the Internet. One condition of the grant was that the library install filters on their computers to prevent minors from gaining access to pornographic material. Like the Ninth Circuit majority, the plaintiffs in *American Library Association* argued that the government had created a designated public forum. The Court rejected this argument because a "public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to

speak". *American Library Ass'n*, 123 S. Ct. at 2305 (plurality opinion). The reason a library provides internet access is not to "encourage a diversity of views from private speakers, but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality". *Id.* (citation omitted). Similarly, the purpose of the Promise Scholarship is not to encourage a diversity of views. The purpose is to help low and middle income students reap the economic benefits of a college education.

Rosenberger does not apply here because the Promise Scholarship is not a public forum. Moreover, the majority's application of forum analysis to programs that do not encourage speech is especially problematic if applied to programs involving the intersection of the Establishment Clause and the Free Exercise Clause.

For example, in *Mitchell*, the Court rejected a challenge under the Establishment Clause to a program that authorized funds "for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials". *Mitchell*, 530 U.S. at 802. The program was available to public and private schools, including religious schools. Presumably, the Ninth Circuit majority would find this to be a public forum under *Rosenberger* since, in its view, funding student publications is not much different than funding students' education. Pet. 20a.

The problem is that, under the majority's analysis, the program approved by the Court in *Mitchell* would fail under *Rosenberger*. The Ninth Circuit majority concluded that the Promise Scholarship was not viewpoint neutral "because state policy excludes only those recipients who pursue the study of theology from a religious perspective". Pet. 12a. But the program approved in *Mitchell* does precisely the same thing. The aid could not be used to finance religious indoctrination. *Mitchell*, 530 U.S. at 840 (O'Connor, J., joined by Breyer, J., concurring in the judgment) ("I also disagree with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause."); *id.* at 890 (Souter, J., joined by Stevens, J., and Ginsburg, J., dissenting) ("we have long held government aid invalid when circumstances would allow its diversion to religious education"). Thus, a religious school could not take advantage of the assistance if it intended to use the aid for the purpose of religious instruction. Under the majority's analysis, this would constitute viewpoint discrimination under *Rosenberger*.[11]

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[11] The Ninth Circuit also went astray in assuming that, because the *Velazquez* Court found the forum cases instructive in a case involving the subsidy of speech activities, forum analysis properly applies to every government subsidy. Pet. 20a-21a. This ignores the entire function of forum analysis: weighing limitations on *speech* activities. *See Cornelius*, 473 U.S. at 800. *American Library Association* refutes this suggested extension of *Velazquez*. *See American Library Ass'n*, 123 S. Ct. at 2309 n.7.

The answer, of course, is that the program at issue in *Mitchell* does not constitute a public forum. What the majority considers viewpoint discrimination is, in reality, the distinction between secular and religious instruction that reflects the purposes of the Establishment Clause. The same thing is true of the Promise Scholarship program.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

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